
COUNTY OF DANE,

Petitioner,

MEMORANDUM DECISION

vs.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,Case No. 79-CV-2778

Respondent.

Decision No. 16946

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding by the petitioner County under secs. 111.07(8), 111.70(4) (a) and (d), and ch. 227, Stats., to review the Certification by the Wisconsin Employment Relations Commission (hereafter WERC) dated May 11, 1979, of the Madison Theatrical Stage Employees and Moving Picture Machine Operators Local 251, (hereafter IATSE and MPMO), as the exclusive representative of all employees in a collective bargaining unit consisting of the Maintenance/Stagehand position and all other persons employed by the county as stagehands performing work as stage carpenters, stage electricians, property persons, spotlight operators, fly-persons, riggers and wardrobe workers at the Dane County Exposition Center-Memorial Coliseum.

STATEMENT OF FACTS

John Sparks is employed full-time by the County as the maintenance/stagehand at the Dane County Exposition Center-Memorial Coliseum (hereafter the Coliseum). The job description for the maintenance/stagehand position (Ex. 4) provides:

"DEFINITION

Under supervision of Superintendent of Buildings and Grounds, prepares and sets up stage scenery, properties, and lighting equipment in any and all buildings at the Exposition Center, including temporary staging and related equipment for outside use. Builds, covers, arranges, sets up and tears down stages, platforms, and related equipment either independently or supervising a crew acting in the position of 'houseman'. Maintains and operates a variety of staging, permanent and portable spotlights including super troupers, maintains and operates lighting switchboard, intercommunication necessary for light cues. Keeps all stage related equipment in proper repair and working order, making minor mechanical and electrical repairs. Keeps records and makes reports as necessary. Sets up and tears down events in all buildings as well as outside events at Exposition Center.

KNOWLEDGE AND SKILLS

Must have knowledge of all related stage equipment and general stage problems and procedures; considerable knowledge of the construction, assembly and erection of theatrical scenery and stage props; considerable knowledge of the occupational hazards and safety precautions of the trade; ability to work from plans, rough sketches and specifications, and to follow instructions written or oral; must have skill in handling electrical instruments and equipment; skill in the use of tools of the trades and wood-working machinery; (Note: This is an extremely physically strenuous job when rigging an ice show, circus, stage show, etc. Often this employee will be working at various heights up to 100 feet).

TRAINING AND EXPERIENCE

Must be a high school graduate with five years experience in the general trade with progressively responsible duties in backstage work including rigging, lighting, carpentry and related electrical work."

Dane County Union Local 65, AFSCME, is the exclusive bargaining representative for most Coliseum employees except for, among others, casual employees and craft employees (Ex. 6). The bargaining unit represented by Local 65 includes limited term employees but such employees have only limited rights under the collective bargaining agreement (Ex. 6). The maintenance stagehand position is not included in the bargaining until although Sparks receives the same wages and benefits as Local 65 employees.

Both Local 65 and the County have always considered and treated Sparks as a craft employee. Sparks has been a member of Madison Theatrical Stage Employees and Moving Picture Machine Operators Local 251, IATSE and MPMO, since 1967.

Local 251 runs a hiring hall and assigns qualified stagehands to work jobs within its jurisdiction. Virtually all stagehand work at the Coliseum is performed by Sparks and by persons referred by Local 251. The County calls Local 251 when it needs stagehand employees and specifies the number of employees needed. The County does not specify particular individuals and does not care whether Local 251 always refers the same persons or whether it spreads the work among its members.

Local 251 refers persons to the County on the basis of job qualifications, seniority and availability. Usually one to five persons are referred at any one time but the same persons are not always referred (Ex. 3). Approximately twenty-five persons are referred to the County during the course of a year (Exs. 1,20). Persons referred by Local 251 are registered by the County as limited term employees in Classification 40-Stagehand (Ex. 5):

"STAGEHAND - with the Dane County Exposition Center to perform a variety of tasks related to the preparation and operation of stage scenery, properties and lighting equipment. Requires formal recognition by the appropriate international or local trade union or equivalent."

Sparks as the "houseman" directs the employees referred by Local 251 and they work with him in loading and unloading trucks, setting up sound and lighting equipment, doing stage wiring, setting up band equipment and props, hanging and handling curtains, performing set changes, operating the lighting console, dimmer board and spotlights, and handling any emergency situations. When Sparks is sick or otherwise unavailable to perform the houseman functions, Local 251 refers a substitute.

Sparks performs both stagehand and maintenance work. Steve Schroeder, Local 251 business agent, testified that Sparks spends the majority of his time performing specific stage-related duties. Sparks' supervisor, Marv Peterson, testified that Sparks spends the majority of his time (approximately 57 percent) performing maintenance work. Some of the maintenance work described by Peterson, however, relates directly to cleaning and repair of stage equipment--changing wheels on portable equipment, replacing bent or damaged legs, replacing stage decking, making sure that stage accent lighting and mechanical equipment in spotlights (levers and arms) are in proper working order, and repairing torn curtains. Sparks also performs maintenance work such as cleaning the stage, cleaning draperies, and painting. Local 65 personnel likewise perform maintenance work but some particular types of maintenance work are performed only by Sparks.

Although Local 251 was never formally recognized by the County as Sparks' bargaining representative, it did represent him in several grievances between 1972 and 1978 over matters such as punching a timeclock, overtime pay, and disciplinary actions, (Exs. 9-14). On September 11, 1978, Local 251 demanded that the County recognize it as the collective bargaining representative for stagehands employed by the County (Ex. 7). On September 21, 1978, the County responded that it had no objection to negotiating with bargaining representatives certified by WERC and suggested that Local 251 petition for representation through it (Ex. 8).

On October 3, 1978, Local 251 filed a petition for election. On April 3, 1979, after hearing, WERC determined that an appropriate bargaining unit within the meaning of the Municipal Employment Relations Act (hereafter MERA), secs. 111.70(4)(d)2a, Stats., would include:

"[T]he Maintenance/Stagehand position, and all other persons employed by Dane County as stagehands performing work as stage carpenters, stage electricians, property persons, spot-light operators, fly-persons, riggers and wardrobe workers at the Dane County Exposition Center-Memorial Center"

WERC directed an election among Sparks and all hiring hall referral employees who were available and who worked in four or more payroll periods in the 26 payroll periods preceding April 3, 1979. The election was conducted and, on May 11, 1979, WERC certified Local 251 as the exclusive collective bargaining representative for the employees in the stagehand bargaining unit.

THE ISSUES

The County's brief raises these issues:

- (1) Whether WERC could reasonably conclude that Sparks was a craft employee within the meaning of sec. 111.70(1)(f), Stats.
- (2) Whether WERC could reasonably conclude that those individuals referred to the County from the union hiring hall are "municipal employes" within the meaning of sec. 111.70(1)(f), Stats.
- (3) Whether the bargaining unit certified by WERC is an appropriate one within the meaning of sec. 111.70(4)(d)2,a, Stats.

STATUTES INVOLVED

Section 111.70(1)(f), Stats., provides:

"'Craft employe' means a skilled journeyman craftsman, including his apprentices and helpers"

Section 111.70(4)(d)2a, Stats., provides:

"The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. . . . The commission shall not decide that any unit is appropriate if the unit includes both craft and non-craft employes unless a majority of the craft employes vote for inclusion in the unit"

THE COURT'S DECISION

A. Whether WERC Could Reasonably Conclude Sparks was a Craft Employee.

WERC found that "Sparks has the knowledge and experience of a journeyman stagehand, and performs duties of a journeyman stagehand and therefore is employed as a skilled journeyman craftsman" (Finding 7 in Direction for Election dated April 3, 1979). Conclusion of Law 1 of the Direction for Election concluded that Sparks is a "craft employe" within the meaning of sec. 111.70(1)(f) of MERA.

In Ray-O-Vac Co. v. Wisconsin E.R. Board, 249 Wis. 2d 112, 119-120, 23 N.W. 2d 489 (1946), the Supreme Court stated:

"[T]he term 'craft' . . . was intended to comprehend any group of skilled workers whose functions have common characteristics distinguishing them sufficiently from others so as to give such group separate problems as to working conditions for which they might desire a separate bargaining agent

. . .

The word 'craft', . . . is defined in Webster's New International Dictionary (2d ed.) as follows:

'a. Art or skill; dexterity, as in some manual employment, aptitude, skillfulness in planning or executing

b. An occupation or employment requiring this; a manual art; a trade, business, or profession

c. Those engaged in any trade, taken collectively; a guild; as, the craft of ironmongers.'

In 10 Words and Phrases, p. 322, there is the following comment under the subject 'craft', --

'Technically, a 'labor union or organization' is generally composed of members of 'craft,' which is trade or occupation of kind requiring skill and training, particularly manual skill combined with knowledge or principles of art, and also body of persons pursuing such calling'"

The County's brief emphasizes that a considerable part of Sparks' time is spent doing maintenance work and that some of his maintenance duties were very basic,--from painting a door to resurfacing the stage; and that Local 65 employees also perform some of the same maintenance work performed by Sparks.

The evidence is in conflict as to whether Sparks spends a majority of his time doing maintenance work. As noted in STATEMENT OF FACTS, supra, Schroeder, the Local 251 business agent testified Sparks spends the majority of his time performing stage-related duties, and WERC had the right to accept this testimony as true in making its finding that he was a craft employee.

The County cites Manitowoc Board of Education, WERC Dec. No. 6856 (Sept. 1964), in support of its argument that Sparks is not a craft employe because his work is not confined to a single craft. That decision, however, does not say that an employee must spend one hundred percent of work time performing in a single craft. Rather, the employees in Manitowoc were found not to be craft employes because they were engaged primarily in general maintenance work. This is not true in Sparks' case.

The County's own job description for the maintenance/stagehand position requires "five years experience in the general trade with progressively responsible duties in back-stage work including rigging, lighting, carpentry and related electrical work" (Ex. 4). The testimony of business agent of Local 65 and the County's personnel director was to the effect that Local 65 and the County considered and treated Sparks as a craft employee.

The County further contends that Sparks is not a craft employee because he lacks formal apprenticeship and receives the same rate of pay as noncraft employees.

In Winnebago County Hospital, WERC Dec.No. 6043 (July 1962), WERC ruled that to be a craft employe, an individual must have a substantial period of apprenticeship or comparable training, unless the individual has equivalent experience. Here the County requires an applicant for the maintenance/stagehand position to have had "five years experience in the general trade with progressively responsible duties" (Ex. 4). Sparks has been a member of Local 251 since 1967. From this and the above quoted excerpt from his job description WERC could reasonably infer that Sparks possessed experience in his trade equivalent to apprenticeship.

The fact that his rate of pay was no different than that of noncraft County employees in the Local 65 bargaining unit may well have been due to the fact of his being an unrepresented craft employee who lacked any bargaining power to achieve a rate of pay commensurate with that which other of his craft enjoy in collective bargaining units represented by IATSE and MPMO. The County's reply brief cites Lincoln County, WERC Decision No. 6200 (January 1963) as holding that the fact that an employee was paid the same wages as noncraft employees was a factor to be considered in determining whether he was a craft employee. Under the instant fact situation the court is of the opinion WERC could reasonably consider this was not a factor to be accorded much weight.

The court concludes that Finding of Fact 7 of the Direction of Election is supported by substantial evidence in the record because there was such "relevant evidence as a reasonable mind might accept as adequate to support" this finding that Sparks is employed by the County as a skilled journeyman craftsman. Stacy v. Ashland County Dept. of Public Welfare, 39 Wis. 2d 595, 603, 159 N.W. 2d 630 (1968). With respect to Conclusion of Law 1 of the Direction for Election the court determines that the statutory interpretation therein made of sec. 111.70(1)(f), Stats., is a reasonable one which should be upheld. Board of Education, Brown Deer Schools v. Wisconsin Employment Relations Commission, 86 Wis. 2d 201, 210, N.W. 2d (1978).

B. Whether WERC Could Reasonably Conclude Those Individuals Referred to the County from the Union Hiring Hall are "Municipal Employees" within the Meaning of Sec. 111.70(1)b

WERC found that hiring hall referral employees, who are on the hiring hall referral list and available to work in the future and who worked in four or more payroll periods in the last 26 payroll periods performing stagehand work in assistance to and as back-up for Sparks, are employed by the County to do work of a craft nature on a sufficiently regular basis so as to have an interest in the wages, hours and working conditions of the stage hands employed by the Dane County (Finding 8 in the Direction for Election).

While the definition of "municipal employe" in sec. 111.70(1)(f) does not expressly exclude a casual employee, the County's brief contends that union hiring hall referral stagehand employees were casual employees, and that WERC had "on numerous occasions" held that casual employees are to be excluded from MERA bargaining units. The County particularly stresses the holding in City of Medford, WERC Decision No. 16846 (February, 1979).

The decision in the City of Medford case was concerned with the composition of the collective bargaining unit for the police department of the City of Medford. It specifically excluded from the bargaining unit one Bowers because he was "not a regular law enforcement employe but is a casual employe." Bowers was employed full-time by another employer. He had been changed from a regularly scheduled part-time patrol officer to an on-call basis after the employer hired another full-time officer.

In the memorandum accompanying the decision it was stated:

"The Commission has held that the determinative factor in deciding whether an employe is casual is the regularity of employment rather than the number of hours worked. In this particular case, it is difficult to predict with accuracy the regularity of Bower's employment because he is no longer regularly scheduled and because it is uncertain how often he will be called. With the addition of a fourth full-time officer, it is likely that Bowers will work irregularly Therefore, the Commission concludes that Bowers is a casual employe and is excluded from the bargaining unit, which the parties have agreed should be limited to regular employes." (Emphasis added)

In City of Medford, the primary issue was whether Bowers as an individual would have a sufficient continuing employer-employee relationship with the City to be included in the bargaining unit. In this proceeding, the proper focus is not on any particular individual, but rather, on the fact that Local 251 has regularly referred stagehands over the years to perform stagehand work at the Coliseum. Further, in City of Medford, the parties had agreed that the bargaining unit would be limited to "regular full-time . . . and part-time employes" (emphasis added), and there is no such agreement in this proceeding.

The present case differs from the City of Medford case in another important respect. Exhibit 3 lists the shows at the Coliseum on which stagehands referred from Local 251's hiring hall had worked during 1977 and in 1978 up to November 2 of that year. In 1977 there were approximately 120 days on which such stagehands had worked. In 1978 up to November 2nd there were 57 separate dates of employment of such stagehands. Exhibit 3 also shows on the average three to four stagehands worked each show. This demonstrates that the employment was regular although particular individuals may not have worked regularly for the County.

WERC's brief cites as a more applicable precedent Kenosha Unified School District No. 1, WERC Decision No. 14908 (Sept. 1976), where the WERC ruled that substitute teachers were "municipal employes" within the meaning of MERA and were entitled to engage in collective bargaining under that Act. The school district had argued that the substitute teachers were only casual employees since they work only on an "as needed" basis, since some individuals on the substitute teacher roster may never actually work during a given school year, since substitute teachers are not precluded from simultaneous employment with other employers, and since substitute teachers have no expectation of continued employment. Alternatively, the school district argued that even if some substitute teachers were municipal employees within the meaning of MERA, only those substitute teachers with a sufficient regularity of employment (based on a minimum number of days of employment in the previous school year) should be included.

WERC rejected the school district's arguments and concluded that "the collective bargaining unit should consist of all substitute teachers employed by the Kenosha Board of Education regardless of the number of days taught but that only those substitute teachers who meet some minimal standards of prior and present employment status should be allowed to vote" in the representation election. Similarly, in this proceeding, WERC included all individuals referred to the Coliseum by Local 251 in the stagehands collective bargaining unit, but limited voting in the representation election to individuals who were available to work and who worked in four or more payroll periods preceding the direction of election.

Except for Sparks, virtually all stagehand work at the Coliseum historically has been performed by individuals referred by Local 251. Although the same persons are not always referred, it always is Local 251 referral employees who perform the work. When the County needs stagehand employees, it calls Local 251. The fact that the County does not specify particular individuals (for reasons not explained in the record) does not negate the fact that Local 251 referral employees as a group, in conjunction with Sparks (a member of Local 251), regularly perform all required stagehand work at the Coliseum.

The County's reply brief advances the argument that there exists no ongoing employment relationship between the County and the hiring hall referral employees. The court is of the opinion that the past practice as it related to those hiring hall referral stagehands rendered it reasonably probable that this practice would be continued in the future.

The County cites other WERC decisions it contends requires that hiring hall referral employees while working at the Coliseum not be held to be County employees within the meaning of sec. 111.70(1)(f). If the County is correct in such contention, then such prior cited decisions are inconsistent with the recent Kenosha Unified School District No. 1 decision cited supra. Administrative Agencies, however, are not bound by the doctrine of stare decisis. Dairy Employees Ind. Union v. Wis. E.R. Board, 262 Wis. 280, 55 N.W. 2d 3 (1952); Nick v. State Highway Comm., 21 Wis. 2d 489, 124 N.W. 2d 574 (1963); Robertson Transport Co. v. Public Service Comm., 39 Wis. 2d 653, 159 N.W. 2d 636 (1968).

The court determines that, on the basis of WERC's holding in the Kenosha Unified School District No. 1 case, it could reasonably conclude that the hiring hall referral employees it included in the bargaining unit were "municipal employes" within the meaning of sec. 111.70(1)(f), Stats. WERC expressed its policy with respect to casual or irregular employees in its memorandum appended to its Direction of Election in these words, "it is sometimes appropriate to include in a bargaining

unit employes who perform work on an irregular basis which is functionally related to the positions occupied by other employes in the unit." Here the work performed by the hiring hall referral stagehands was functionally related to that performed by Sparks.

C. Whether Bargaining Unit Certified by WERC is an Appropriate One Within Meaning of Sec. 111.70(4)(d)2,a.

The County contends that as a matter of law the bargaining unit determined by WERC was not an appropriate unit within the meaning of sec. 111.70(4)(d),2,a.

Some of the arguments advanced by the County in support of this contention have previously been dealt with herein and answered. Therefore, the court will here consider only those arguments which have not been previously so considered. The four further arguments which the court deems merit consideration are: (1) the referral stagehands did not have the same supervisor as Sparks; (2) the referral stagehands were not directly paid by the County while Sparks was; (3) for some months preceding the WERC hearing Sparks has not consistently "worked" shows at the Coliseum; and (4) the bargaining unit established by WERC violates the fragmentation prohibition of the statute.

The testimony with respect to supervision was that Sparks was supervised by Peterson, the Coliseum Buildings and Ground Superintendent, and by Doerfer, the Building Maintenance Manager, who works under Peterson's supervision; while the hiring hall referral stagehands worked under the supervision of Sparks. However, because Peterson and Doerfer were the supervisors of Sparks it follows that they had the ultimate power of control over the referral stagehands. The court is of the opinion that the factor of common supervision was one that WERC could reasonably conclude was not of particular significance in passing on the question of the appropriate bargaining unit.

With respect to method of payment of wages, there is no question but that temporary referral stagehands were on the county payroll. Robert Maier, the Coliseum Assistant Manager/Cost Accountant, was in charge of the Coliseum payroll and he prepared from such payroll records Exhibit 1 showing the amounts paid the temporary referral stagehands during 1978. This exhibit shows each referral stagehand's name who worked at the Coliseum in that year, the amount paid him in each payroll period he worked rounded out to even dollars, and then in the righthand column the total amount received by each during that year in dollars and cents. What is confusing in the evidence is testimony given by Schroeder that these referral employees who worked at the Coliseum were paid "through the Madison Ticket Agency" (Tr. 11-12). The reasonable inference is that Coliseum payroll checks were issued in the names of the stagehands and then given to the Madison Ticket Agency for delivery to the payees named in the checks. The court is of the opinion that WERC could reasonably conclude that it was immaterial from the standpoint of the appropriate bargaining unit that Sparks received his pay check directly from the Coliseum payroll officer while the temporary stagehands' pay checks were given by the Coliseum payroll office to the Madison Ticket Office for delivery to them.

In order to demonstrate that there is no community of interest between Sparks and the temporary referral stagehands, the County cites testimony by Schroeder it contends establishes that commencing eight months to a year prior to the hearing Sparks has not "consistently worked" shows. However, an analysis of Schroeder's testimony (Tr. 14-15) shows that what occurred during this period was that, in order to relieve Sparks from putting in so much overtime work when a show was in progress, the supervisory personnel of the Coliseum requested Local 251 to provide someone to take the place of Sparks during part of the time a show was in progress which was done.

The County's fragmentation argument is grounded on the provision of sec. 111.70(4)(d)2a, Stats., which states "The Commission . . . shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force." This statute, however, also provides,

"The Commission shall not decide that any unit is appropriate if the unit includes both craft and noncraft employes unless a majority of the craft employes vote for inclusion in the unit." The court holds that, inasmuch as WERC reasonably determined that Sparks was a craft employee, it properly interpreted the last quoted provision of the statute as requiring that Sparks not be included in the same bargaining as the other Coliseum employees represented by Local 65.

Let judgment be entered that WERC's Certification of Representative, Decision No. 16946, which is the subject of this review, be affirmed.

Dated this 31st day of January, 1980.

BY THE COURT:

George R. Currie /s/
Reserve Circuit Judge